FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 10 1969
JOHN F. DAVIS, CLERK

Nos. 369 and 382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, ET AL.,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

---

MOTION TO AFFIRM

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204

PETER T. BEARDSLEY
NELSON J. COONEY
1616 P Street, N. W.
Washington, D. C. 20036

Attorneys for Appellees

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
STATEMENT	2
ARGUMENT	10
CONCLUSION	20
CERTIFICATE OF SERVICE	22
APPENDIX A—List of Appellees herein	23
APPENDIX B—Support letter of Curtis L. Wagner, Jr., Chief, Regulatory Law Division, Office of the Judge Advocate General, Department of the Army	24

CITATIONS

CASES

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 13

Acme Cartage Co. v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968) 12-13, 16, 21

Atchison, T. and S. F. R.R. v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964) 18, 19

Central Freight Lines, Inc. v. *Strickland Transportation Co., Inc.*, 102 M.C.C. 291, 298 (1966) .. 17

Dixie Carriers v. *United States*, 143 F. Supp. 844 (S.D. Tex. 1956), *vacated*, 355 U.S. 179 20

Estes Express Lines v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam* 394 U.S. 718 ..... 16, 17

Hussey v. *United States*, 271 F. Supp. 650, 653 (N.D. Cal. 1967) 15

Inland Steel v. *U.S.*, 306 U.S. 153, 160 (1939) 17, 18

Motor Carrier Temporary Authorities, 98 M.C.C. 483 (1965) 11, 12

Munitions Carriers Conference, Inc. v. *American Farm Lines*, 1968 F. Carr. Cas. ¶ 81,993 (W.D. Okla.) 3

Munitions Carriers Conference, Inc. v. *American Farm Lines*, Civil No. 68-148, D.C. W.D. Okla., May 28, 1968 3

Page

Munitions Carriers Conference, Inc. v. *American Farm Lines*, Civil No. 68-148, D.C. W.D. Okla., July 24, 1969 4
Munitions Carriers Conference, Inc. v. *American Farm Lines*, 1969 F. Carr. Cas. ¶ 82,122 (10th Cir.) 3
Northwest Agricultural Cooperative Ass'n v. *Interstate Commerce Commission*, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) 2, 3, 4
Pacific Molasses Co. v. *FTC*, 356 F. 2d 386 (5th Cir. 1966) 13
Pan-Atlantic S.S. Corp. v. *Atlantic Coast Line R.R.*, 353 U.S. 436 (1957) 5-6, 11
Roadway Express, Inc. v. *United States*, 263 F. Supp. 154, 158 (N.D. Ohio 1966) 16
Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 221 (D.C. Cir. 1959) 13
Service v. *Dulles*, 354 U.S. 363 (1957) 13
Strickland Transportation Co. v. *United States*, 274 F. Supp. 921 (N.D. Tex. 1967), *aff'd per curiam* 389 U.S. 574 18
Superior Trucking Co. v. *United States*, 1969 F. Carr. Cas. ¶ 82,108 (N.D. Ga.) 16, 17
Three "I" Truck Lines, Inc. v. *I.C.C.*, 246 F. Supp. 410 (N.D. Iowa 1965) 15

Statutes and Rules

Interstate Commerce Act, 49 U.S.C. § 301 *et seq.* 11
Interstate Commerce Act, Section 203(b)(5), 49 U.S.C. § 303(b)(5) 2, 3, 4
Interstate Commerce Act, Section 210a(a), 49 U.S.C. § 310a(a) 7, 11, 20
P.L. 90-433, 82 Stat. 448 ..... 4, 5
49 C.F.R. § 1100.1 7
49 C.F.R. § 1131.2(c) 6, 12, 15
49 C.F.R. § 1131.4(b) 8
49 C.F.R. § 1131.4(b)(4) 15, 16
49 C.F.R. § 1131.6 7-8

Miscellaneous

Page

Hearings on H.R. 6530 and S. 752, by the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-45, pp. 9-10 (1968) 5

Hearings on S. 752, Subcommittee on Surface Transportation, Senate Commerce Committee, 90th Cong., 1st Sess., ser. 90-34, pp. 153-154 (1967) 5

Report of the Senate Commerce Committee, S. Rep. No. 1152, 90th Cong., 2d Sess. 2 (1968) 4-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, ET AL.,
Appellees.

No. 382

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

---

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees listed in Appendix A hereto move that the final judgment of the District Court be affirmed on the

ground that the questions presented are so unsubstantial as not to require further argument.

STATEMENT

Involved are appeals by the Interstate Commerce Commission (Commission) and American Farm Lines (AFL), from a judgment [1] of a three-judge district court entered March 26, 1969, reported at 298 F. Supp. 1006. The court below, without dissent, set aside two orders of the Commission [2] which granted temporary authority to AFL to conduct motor carrier operations for the Department of Defense (DoD) between points in nine midwestern states and five western states.

AFL is an "agricultural cooperative," [3] with an alleged purpose to provide transportation services to its members. Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), exempts this type of service from economic regulation. The exemption was construed by a U.S. Court of Appeals [4] in 1965 to permit agricultural cooperatives to transport nonfarm-related freight for nonmembers by motor vehicle to the extent that such is "incidental and necessary" to the effective performance of a cooperative's farm-related operations. The court related these terms to Northwest's transportation of non-

[1] The opinion of the court below is printed as Appendix A (pp. 1a-12a) to the jurisdictional statement in No. 369. The judgment is printed as Appendix B thereto (pp. 13a-17a).

[2] J.S. in No. 369, App. C and E.

[3] The question of whether AFL has, since its inception, operated as a *bona fide* co-op is involved in another proceeding before the Commission which has been joined with AFL's application for permanent operating authority. Docket Nos. MC-C-5835 and MC-129908 (Sub-No. 1). Joint hearings in these proceedings are under way.

[4] Northwest Agricultural Cooperative Ass'n v. Interstate Commerce Commission, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

farm products and supplies and found it to be incidental and necessary both in character and amount:

> Incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips, and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable.[6]

Shortly after AFL began hauling freight for DoD in December, 1966, it began conducting a general trucking business transporting DoD traffic in back-to-back movements. A United States district court enjoined this round trip (back-to-back) service as not exempt under section 203(b)(5) of the Interstate Commerce Act.[6] Thereupon, AFL began transporting DoD traffic in one direction and moving the vehicle empty in the opposite direction in order to effect literal compliance with the injunction. The same court, on the same grounds, again enjoined AFL from providing this transportation except as a leg of a round trip, the other leg of which constitutes transportation of farm-related commodities performed for its members.[7] Both of these judgments have been recently affirmed by a United States Court of Appeals.[8]

---

[6] *Id.*, at 255.

[6] Munitions Carriers Conference, Inc. v. American Farm Lines, 1968 F. Carr. Cas. ¶ 81,993 (W.D. Okla.). Plaintiffs, in addition to the Conference, were seven motor carriers franchised by the Commission to transport general freight (including munitions), including some of the appellees herein.

[7] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C.W.D. Okla., May 28, 1968.

[8] Munitions Carriers Conference, Inc. v. American Farm Lines, 1969 F. Carr. Cas. ¶ 82,122 (10th Cir.); the court's opinion is printed in Motion of Railroad Appellees to Affirm at pp. 19A-26A.

Still undeterred, AFL continued to operate substantially as a for-hire motor carrier for DoD traffic. Plaintiffs in the two injunction proceedings [9] filed a show cause petition in the Oklahoma district court seeking punishment of AFL for violation of its injunctions. That court has recently concluded [10] that AFL is in contemptuous violation of its injunctions and that the nature of AFL's operations and the fact that the bulk of its revenues is derived from government transportation demonstrate that it is in the general trucking business beyond the limited exemption allowed by law. The court found a "general devotion of defendants to their government traffic" and "preferential handling of such over the traffic of their own members." [11] The court assessed damages of almost $75,000 against AFL, consisting of $43,650 representing profits illegally diverted from plaintiff carriers over approximately a two-month period, and the remainder in attorney's fees and expenses.[12]

Further frustrating the aims of AFL was Congressional enactment of Public Law 90-433, 82 Stat. 448, effective July 26, 1968, which specifically limits the amount of nonmember traffic which may be handled under the agricultural cooperative exemption contained in Section 203(b)(5) of the Interstate Commerce Act. Congressional action was taken because certain cooperatives were taking undue advantage of the *Northwest* decision, and it was being used by others as a device to mask illegal operations.[13]

---

[9] The Commission intervened as an additional plaintiff.

[10] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C.W.D. Okla., July 24, 1969; the court's opinion is printed in full in Motion of Railroad Appellees to Affirm at pp. 2A-16A.

[11] See Motion of Railroad Appellees to Affirm, p. 12A.

[12] *Id.*, p. 16A.

[13] The Report of the Senate Commerce Committee, 90th Cong., 2d Sess., Senate Report No. 1152, states at page 6:

[Footnote continued on page 5]

Much is made in the jurisdictional statements of AFL and the Commission [14] regarding the claimed need for AFL's services by DoD and the alleged harm caused DoD by the enactment of Public Law 90-433 limiting even *bona fide* farm co-op nonmember for-hire transportation to 15 percent of their total transportation. Yet Congress was faced with these same claims, i.e., that enactment of the law in question, particularly the 15 per cent limitation on nonmember for-hire transportation, would deprive the military of the "efficient service" of farm cooperatives at "reasonable cost without adverse impact on regulated carriers." [15] Despite these "dire warnings," Congress enacted the legislation.

In order to transport DoD traffic without the limitations imposed by the injunctions and the newly amended exemption provision, AFL filed in May, 1968, the temporary authority application here under consideration. Should AFL succeed herein, it could continue to transport DoD traffic until a final determination by the Commission on AFL's permanent authority application,[16] which was

---

[13] [Continued]

Regardless of the state of the law prior to the *Northwest* decision, the committee considers that it is clear that this decision, and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities.

[14] J.S. in No. 369, pp. 12-13; J.S. in No. 382, pp. 3, 5-6.

[15] Letters of Stanley R. Resor, Secretary of the Army, in Hearings on S. 752, Subcommittee on Surface Transportation, Senate Commerce Committee, 90th Cong., 1st Sess., ser. 90-34, pp. 153-154 (1967), and Hearings on H. R. 6530 and S. 752, by the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-45, pp. 9-10 (1968).

[16] This Court held, in Pan-Atlantic S.S. Corp. v. Atlantic Coast Line RR., 353 U.S. 436, that a grant of temporary authority was a "license" which, under the provisions of Section 9 of the Adminis-

filed in July, 1968. Such an extensive application, affecting numerous existing carriers, will undoubtedly require several years for final determination. There is definite evidence that AFL, if permitted, would haul substantially more DoD traffic in the future. In AFL's fiscal year 1967, gross revenue from government traffic amounted to $1,284,594.94; in 1968, $4,449,478.39; and in the first six months of 1969, $4,040,633.80.[17]

With the foregoing facts in perspective, we turn now to the temporary authority proceeding here involved. In an unprecedented move, DoD agreed to support this type of application.[18] The numerous protests to AFL's temporary authority application pointed out that the sole supporting letter of the DoD did not supply even the minimal information required by the Commission's regulations[19]

---

trative Procedure Act, remains in effect until the Commission has "finally determined" a corresponding application for permanent authority.

[17] The gross revenue for the first six months of 1969 constituted 65% of the total revenue of American Farm Lines during that period. These figures, gathered by the Commission's Bureau of Enforcement, appear in Exhibit H-2 in Docket No. MC-C-5835. The exhibit is attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court. The motion below was denied by order dated July 22, 1969; the motion before this Court was granted by Mr. Justice Douglas' order of August 21, 1969.

[18] The DoD witness in the hearing on AFL's permanent authority application testified that until then, applications for single-line service were not being supported by DoD where adequate interline service existed. The witness testified that a policy restatement was made in June, 1968, to permit for the first time support of such applications and the regulations are in the process of revision. (Transcript pp. 611-615) In a letter dated 15 days prior to its letter supporting AFL's application, DoD had indicated to AFL it was unable "to state that there would be insufficient or inadequate service without American Farm Lines." This letter was attached as Exhibit C of appellees' original complaint below and is printed in full in the Motion of Railroad Appellees to Affirm at pp. 27A-28A.

[19] 49 C.F.R. § 1131.2(c). These regulations list eleven items which any supporting statement must contain. The items are enumerated in the jurisdictional statement in No. 369 at pages 8-9, n. 10.

and, concomitantly, that AFL failed to meet its statutory burden of proof.[20] Protestant carriers also expressed their willingness and ability to meet the reasonable service requirements of DoD. The Commission's Temporary Authorities Board, by order served July 15, 1968, denied AFL's temporary authority application.

AFL petitioned for reconsideration and, at that late date, introduced seven exhibits purporting to show inadequacies of some existing services. Protestants' replies thereto specifically refuted these charges and pointed out that AFL's attempt to discredit the services of a few (7) of the more than 100 protesting carriers by the submission of the seven exhibits fell short of curing applicant's failure to meet its statutory burden of proof. A three-member appellate division of the Commission granted the temporary authority sought on September 3, 1968.

Since the matter was administratively final,[21] complaint

---

[20] 49 U.S.C. § 310a(a) provides:

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be.

[21] AFL is wrong in suggesting that further petitions for reconsideration were authorized, even though some were filed by certain protestants. (J.S. in No. 369 at page 15) AFL cites the Commission's General Rules of Practice; however, the first general rule, 49 C.F.R. § 1100.1, reads:

> The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

The special rules governing petitions for reconsideration in temporary authority application proceedings clearly limit such petitions, at 49 C.F.R. § 1131.6:

> (a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the

was filed in the court below to set aside and annul the Commission's order of September 3, 1968. The court, on October 2, 1968, entered an order staying, *pendente lite*, the effective date of the Commission's order. Despite this, the Commission, on its own motion, by order of November 5, 1968, ordered its proceedings reopened for the purpose of receiving an additional statement by DoD and such reply statements as might be filed by protestants.

The "new" statement of DoD was nothing more than an expression of interest in single-line service. DoD contended that the regulated motor carriers hold "bits and pieces" of authority and that even where complete authority is held between certain points, the regulated carriers prescribed routes are circuitous.[22] The statement

---

Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

The September 3, 1968, order was issued by Division 1 of the Commission acting in an appellate capacity, which situation fits neither of the above categories. Where the temporary authority rules are applicable to all three situations, they are so stated. For instance, 49 C.F.R. § 1131.4(b) reads, in part:

> The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or *in an appellate capacity*. . . . (Emphasis supplied)

[22] Of course, many of the motor carriers, as shown in their protests, possess the requisite authority and do perform direct single-line service between many points. Due to DoD's policy change, regulated motor carriers with restricted authority are now able to seek improved operating rights and over 125 have done so. The DoD witness at the AFL permanent authority application hearing indicated DoD had already agreed to support over 75 of them. Docket No. MC-129908 (Sub-No. 1), Transcript p. 44.

As to circuity, it has been established that AFL generally moves DoD's traffic from Crane, Ind., and Joliet, Ill., to Bangor, Wash., via Springfield, Mo., and Oklahoma City, Okla.—some 600 miles out of the way. See affidavit of Max Morgan attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court.

attempted to impress the Commission by citing tonnage figures and general origin-destination points. Of the substantial volume of traffic DoD ships, it failed to clarify what portion thereof, either by commodity or by points, required expedition and what portion had moved by rail, motor, or some other means. Not one specific instance of a service failure in existing joint-line or single-line service was enumerated.

As the lower court noted,[23] the Commission failed to rule upon protestants' motions to vacate its reopening order. In this "Hobson's choice" situation, protestants were compelled to respond to the DoD statement. These responses pointed out that DoD's generalized and indefinite complaints about the services of unnamed joint-line carriers could not be considered material to the issue of the adequacy of their services. The responses indicated that the shipments transported by the regulated carriers meet DoD's desired delivery dates and, in fact, are frequently delayed by DoD at destination where the freight remains in trailers or boxcars awaiting vessel arrival, resulting in a large waste of equipment at great expense to the carriers.[24]

On December 19, 1968, the Commission, division 1, held that on the basis of the supplemented record before it AFL had met its burden of proof for a grant of temporary authority.[25] A temporary restraining order dated

---

[23] J.S. in No. 369, p. 5a.

[24] As described in affidavits of individual motor carriers attached to plaintiffs' replies to Motion of American Farm Lines For a Stay Pending Appeal, filed below and with this Court.

An example of this delay is found in the opinion of the Oklahoma district court. It refers to a DoD shipment of explosives from Crane, Ind., to Bangor, Wash., which arrived at midnight on November 19, 1968, but the tractor and trailer, along with the driver, "laid over at Bangor for unloading" for 157½ hours (until November 26). See Motion of Railroad Appellees to Affirm, p. 4A.

[25] J.S. in No. 369, App. E.

January 6, 1969, was issued by the court below, staying the effective date of this second grant of temporary authority. On March 26, 1969, the lower court entered its judgment holding the Commission's two identical temporary authority grants null and void.

Hearings by the Commission on AFL's permanent authority application (See fn. 3) will permit full consideration of its *bona fides* and fitness, and DoD's legitimate and reasonable needs. AFL has operated as a scofflaw under the guise of an agricultural cooperative transporting traffic pursuant to an exemption provision of the Interstate Commerce Act. Its member traffic has been ignored in order to serve as a for-hire carrier for the Department of Defense.[26]

ARGUMENT IN SUPPORT OF MOTION

The jurisdictional statements of both the Commission and AFL present substantially the same major and secondary issues: (1) whether the Commission was required, as a matter of law, to follow its regulations governing the processing and determination of AFL's temporary authority application and (2) whether the Commission retained jurisdiction over the proceeding to reopen it after its order was stayed and proceedings for review by the lower court were begun. Appellants' attempt to broaden the issues to include the questions as to whether the lower court applied the proper scope of review and whether the entire record contains evidence to support the Commission's orders, should not succeed, since the lower court's decision does not rest upon those grounds. The lower court did not weigh the evidence; rather it

---

[26] The Oklahoma district court, holding AFL in contempt of its injunctions, found AFL's eastbound DoD shipments unlawful as neither "incidental" nor "necessary" to its members' transportation since two of AFL's members testified to overwhelming needs for the eastbound transportation services of AFL. See Motion of Railroad Appellees to Affirm, p. 11A.

found only that the applicable rules are to be enforced by the Commission as binding upon it as a matter of law.

1. In determining whether the Commission is required to follow the rules it prescribed governing motor carrier temporary authorities, the circumstances under which it acquired statutory power for granting temporary authority (TA) are important. The Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*) provided that authorization of motor carrier operations must follow complete evidentiary hearings with proof of public convenience and necessity and that these proceedings would be subject to full judicial review. A 1938 amendment, added at the request of the Commission, made a narrow exception to such procedure and permitted it to grant temporary authority without hearings at its discretion. The legislative history of the amendment is clear that the Commission was primarily seeking authority to cope with true "emergencies."[27] It was recognized that care must be taken to protect the legitimate interests of other carriers. Thus, section 210a (a) (49 U.S.C. § 310a(a)) provides two conditions precedent to the exercise of its discretion: (1) "an immediate and urgent need," and (2) "to a point or points or within a territory having no carrier service capable of meeting such need."

After 27 years of experience in the issuance of temporary authority, the Commission on its own initiative instituted a rulemaking proceeding in Ex Parte No. MC-67. Upon due consideration of the representations of interested parties, it prescribed certain rules[28] "to govern the filing, processing, and determination of applications by motor common and contract carriers for temporary

[27] The Commission's justification used as examples "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." Pan-Atlantic case, *supra*, 353 U.S., at 144.

[28] 98 M.C.C. 483 (1965), 49 C.F.R. § 1131.

operating authority." The rules became effective July 1, 1965, and are to remain in effect "until modified or revoked, in whole or in part, by further order by the Commission."[29] Distinctions were made in the grounds for approval of "emergency" temporary authority (limited to 30 days) and temporary authority. The rules for temporary authority provide that each application "must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers" and that "[a]ny such supporting statement must contain at least" eleven specific items of information.[30]

Several years after promulgation of these rules, the Commission, in a notice dated January 23, 1968, clarified its policy regarding the temporary authority rules.[31] Referring particularly to the supporting letters required by the TA rules, the notice stated that requests for TA "will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules."

The Commission's TA rules thus set up certain minimum standards of proof, conforming to the statutory standards of section 210a. They set forth standards which, if complied with, will constitute an administrative record which will permit the Commission to make a reasonable determination as to whether there is "an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need." Of the eleven items which each supporting letter must contain, items (8) and (9) are of special significance as essential information for an informed determination. *Acme Cartage Co.* v. *United States*, 290

---

[29] 98 M.C.C. at 496.

[30] 49 C.F.R. § 1131.2(c). See J.S. in No. 369, pp. 8-9, n. 10.

[31] The notice is quoted in full in the Acme case, *infra*, 290 F. Supp. at 456-57, n. 4.

F. Supp. 453 (W.D. Wash. 1968). Items (8) and (9) are:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In view of the Commission's action in promulgating regulations governing TA applications, we submit appellees herein were denied due process of law by its refusal to comply with them. This Court has upheld the rule that agencies must follow the requirements of their own regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). Such is a basic requirement of fair play. Agency action that substantially and prejudicially violates the agency's rules cannot stand. *Pacific Molasses Co.* v. *FTC*, 356 F. 2d 386 (5th Cir. 1966); *Sangamon Valley Television Corp.* v. *United States*, 269, F. 2d 221 (D.C. Cir. 1959).

We disagree with appellant's contention that these cases are inapposite because substantial individual rights are not involved herein.[32] They are indeed; the grant of temporary authority to AFL substantially affected the rights of protesting regulated carriers and altered their future conditon by permitting large amounts of revenue and tonnage to be diverted from them.[33] Protesting regulated carriers, we submit, had a legal right to have the Commission follow its own rules and this Court should not accept the Commission's refusal to heed them. These carriers were greatly handicapped in responding to vague and indefinite allegations of service deficiencies.

---

[32] J.S. in No. 369, p. 20.

[33] This is borne out by the figures cited, *supra*, p. 6, showing diversion of AFL of traffic grossing almost $10 million, over a 2½ year period.

The Commission consistently ignored the procedural and substantive requirements of its own rules. In the first instance, the Commission, division 1, acting as an appellate division, by its order of September 3, 1968, granted AFL temporary authority on the basis of the flimsiest of support letters, totally lacking in substance.[34] The administrative record at that time also included seven late-filed exhibits which AFL had attached to its petition for reconsideration but which were not authorized by the Commission's rules.[35] The Commission's action in later reopening the record to receive additional evidence gives tacit admission of its error in granting TA upon the record at that time. Furthermore, as the court below noted,[36] the Commission in its answer and brief admitted that its September 3 order "may not have been based upon evidence to support its conclusion."

Assuming, *arguendo*, the Commission retained jurisdiction over the proceeding after the district court noted jurisdiction and stayed the Commission's order of September 3, the Commission continued to ignore its own regulations. Instead of reopening the proceeding to reconsider its order of September 3, 1968, in light of the evidence of record, the Commission by summary action on its own motion preferentially permitted AFL to make its case *de novo* by inviting DoD to submit a verified statement specifying "the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by ex-

[34] The letter is attached as Appendix B hereto.

[35] As the court below noted (J.S. in No. 369, p. 7a): "Submission of supplemental data after the applications are filed is not permitted." AFL did not show cause why the exhibits were not initially adduced as evidence nor was their probative value established. These exhibits were a selective study, prepared by AFL, of seven carriers of explosives between selected points and did not begin to represent the sum total of service available to DoD for the movement of general commodities, as well as explosives, between the 14 states involved.

[36] J.S. in No. 369, p. 8a.

isting carriers." [37] The TA rules do not provide for the submission of supporting evidence beyond initial filing of shipper's statement of support. And even more important, the verified statement,[38] although more lengthy, still failed to comply with the minimum evidentiary requirements of the TA rules. Contrary to the TA rules and the Commission's order, DoD's verified statement did not specify the commodities or points for which there is an immediate and urgent need for AFL's proposed service. A presentation of factual information concerning the services of existing carriers as required by Items (8) and (9) of 49 C.F.R. § 1131.2(c), was totally lacking, and instead generalized allegations of service failures and deficiencies were substituted.

An order of the Commission granting TA is undeniably subject to judicial review, which is limited in scope to the issue of whether the Commission's determination was arbitrary or capricious or whether the Commission acted without authority of law or committed an error of law. *Hussey* v. *United States*, 271 F. Supp. 650, 653 (N.D. Cal. 1967); *Three "I" Truck Line, Inc.* v. *I.C.C.*, 246 F. Supp. 410 (N.D. Iowa, 1965).

The decision of the Commission to grant TA to AFL was without basis and constituted error in view of its total disregard of its regulations, for it was impossible for it to make a fair adjudication on the record before it. The circumstances of this administrative proceeding demand reasonable compliance. In applications for temporary authority for the provision of single-line service, as here, there is an obvious likelihood that the shipper is only expressing a preference for that service rather than an "immediate and urgent" need.[39] Furthermore,

---

[37] Order of November 5, 1968.

[38] J.S. in No. 369, App. D.

[39] A specific rule (49 C.F.R. § 1131.4(b)(4)) prescribes the minimum standard of proof in this type of application:

[Footnote continued on page 16]

the Commission was not dealing with a situation where it could extract the prescribed information from multitudinous letters of support,[40] since there is only one supporting shipper here.

Contrary to appellants' argument, the ruling of the lower court is not at variance with the decisions of other district courts. Appellants in so contending refer primarily to two recent decisions: *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 and *Superior Trucking Co.* v. *United States*, 1969 F. Carr. Cas. ¶ 82,108 (N.D. Ga.). The court in *Estes* distinguished it decision from *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), which decision was rendered by the same lower court as herein on substantially the same grounds.[41] The court noted that, unlike the situation in

---

[39] [Continued]

(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

[40] The Commission in one case considered 33 letters of support in their entirety to make its determination. Roadway Express, Inc. v. United States, 263 F. Supp. 154, 158 (N.D. Ohio 1966).

[41] Circuit Judge Hamley sat in the Acme case, whereas Circuit Judge Jertberg sat on the three-judge court below. The court in Acme stated at p. 457:

Having adopted Rules emphatically requiring temporary authority applicants to provide the essential information specified in §(8) and §(9), we find it capricious and arbitrary for ICC, without good cause shown, to ignore or waive compliance with these critically important rule provisions. At a minimum, we find it so when the essential information §(8) and §(9) required to be provided does not appear elsewhere in the record.

Acme, protestants did not allege that they held themselves out to the public as providing the same type of service. Protestants did not profess to have authority to handle all of the express traffic there involved, serving all points that applicant proposed to serve, i.e., nationwide. Therefore, the court reasoned that "[i]nquiries (8) and (9) of the regulations were reasonably answered when the shippers explained why they had made no effort to obtain express service from existing carriers." 292 F. Supp., at 844. In the instant situation, protestants hold themselves out to carry the same commodities to and from the same origin and destination points as AFL.

The court in *Superior Trucking Co.* v. *United States* likewise distinguished its decision from both *Acme* and the lower court decision herein. The court there found that the thirteen supporting shipper statements, taken as a whole, together with their stated needs for "special" equipment, provided the requisite finding that no carriers were capable of fulfilling their needs. The court said that there was both substantial compliance with the regulations and other evidence in the record to support its findings. 1969 F. Carr. Cas. ¶ 82,108 at 54,545.

2. The issue raised by appellants as to whether the Commission possessed jurisdiction to reopen the administrative proceeding after the district court asserted judicial review jurisdiction and restrained the effectiveness of the Commission's grant of temporary authority is clearly not dispositive of this appeal. The lower court's judgment may be affirmed solely upon the first issue. But, dealing with the merits of the second, the Commission is "without power to act inconsistently with the Court's jurisdiction." *Inland Steel* v. *United States*, 306 U.S. 153, 160 (1939). As the court below noted,[42] the Commission, in *Central Freight Lines, Inc.* v. *Strickland Transportation Co., Inc.*, 102 M.C.C. 291, 298 (1966),

[42] J.S. in No. 369, p. 11a.

acknowledged that "when the court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently." On review of the Commission's decision, in *Strickland Transportation Co.* v. *United States*, 274 F. Supp. 921, 925 (N.D. Tex. 1967), *aff'd per curiam*, 389 U.S. 574 (1968), the district court said:

> When a reviewing court has set aside administrative action found not supported by the evidence and has remanded the matter for further consistent proceedings, the Commission is without power to act except in accord with the court's mandate. Inland Steel Co. v. United States, 1939, 306 U.S. 153, 59 S. Ct. 415, 83 L.Ed. 557. . . . Courts are not procedural pawns whose opinions can be frustrated through administrative misadventure. . . .
>
> It is not pride or arrogance that makes it important that echelons, tiers, and hierarchies of courts be more than tables of organization. Our judicial system is premised on tiered decisions. We are not dealing with the trivia of a pecking order but are concerned that the words of a higher court command the respect due them.

Under the circumstances, we believe the lower court was correct in maintaining that the Commission did not have jurisdiction to reopen its proceeding for the purpose of receiving additional evidence upon which it might substantiate its prior admittedly unsubstantiated findings. The lower court pointed out that none of the cases cited by appellants deal with the question presented.[43]

Appellants' reliance on *Atchison, T. & S. F. R.R.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964), as supporting "the Commission's right to reopen its proceedings without leave of court, during the pendency of

---

[43] J.S. in No. 369, pp. 10a-11a.

a judicial review action" [44] is misplaced. The extenuating circumstance there involved, i.e., the plaintiffs' stipulation "that further proceedings in the District Court be stayed pending the Commission's reconsideration of its original order" was all that prevented the court from holding the Commission's action to be a denial of due process. This aspect of that case, not present here, "estopped [plaintiffs] from complaining that the Commission's action in this respect was either arbitrary or unfair." [45] Here the Commission filed with the court below a motion to stay further proceedings two days *after* it reopened the proceeding before it. Although plaintiffs replied to the Commission's motion, the Commission never called it for argument. Its failure to do suggests that it recognized the invalidity of its action absent any agreement of the type involved in the *Atchison* case.

Atchison involved a situation somewhat different than that here. Here, unlike *Atchison*, the Commission, after reopening the proceeding before it, did allow replies to the "new" evidence adduced by DoD. But to rely on this case as supporting appellants is to exalt form over substance. Here, as in *Atchison*, the Commission's proceeding was reopened without prior notice to the court or the protestants. Here—unlike *Atchison*, many of the protestants challenged the authority of the Commission to reopen when its earlier order was already the subject of court review. And here the "right" exercised by some protestants to file reply to the DoD statement—after reopening was thrust upon them by the Commission—and in complete disregard of their right to subject its prior order to court review, was illusory indeed. If the Commission can cure what would otherwise be an unconstitutional invalidity in its procedure by the device em-

[44] J.S. in No. 369, p. 22; J.S. in No. 382, p. 14, n. 13.

[45] Atchison, *supra*, 231 F. Supp., at 428.

ployed here, then, it is indeed in a position to correct *nunc pro tunc* its orders in the process of judicial review, and thus effectively deny such review.[46]

CONCLUSION

The issues are not many or varied. They do not include—though appellants try to inject them—questions involving the proper scope of court review of Commission orders, or whether the Commission's action is supported by substantial evidence. Rather, the issues here are narrowly limited to the questions of (1) whether the Commission is bound by its own rules, or whether, as appellants' arguments boil down to, it has the "discretion" to ignore them when it feels so inclined; and (2) whether the Commission may frustrate court review of its decisions by reopening, without leave of court or agreement of the plaintiffs, proceedings with respect to which the court's review procedure is under way.

The cases cited herein establish that administrative agencies are as bound by their rules as are those subject to their jurisdiction. The Commission's rules were promulgated pursuant to a rulemaking proceeding, in order to assure that applicants seeking TA would adduce evidence sufficient to justify findings, required by the statute, that "an immediate and urgent need" exists for transportation which no carrier already in the field is "capable of meeting." To allow an applicant for TA rights to ignore the requirements of the rules is to deny due process to those who oppose the application

Appellants contend[47] that the lower court's decision "significantly impair[s] the Commission's ability to administer Section 210a(a) effectively . . ." Although we submit this is a highly exaggerated statement, if it has

---

[46] Dixie Carriers v. United States, 143 F. Supp. 844, *vacated* "upon the suggestion of mootness," 355 U.S. 179.

[47] J.S. in No. 369, p. 16 and J.S. in No. 382, p. 8.

any validity, the remedy lies with the Commission itself. If it really believes that compliance with its TA rules significantly impairs its functions, it may change or amend them.[48] The Commission has not seen fit to do so since their promulgation in 1965.

The court below was clearly correct in holding that in the circumstances of this case "without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review."[49] A contrary view would make a mockery of court review of agency decisions whenever an agency whose action became the subject of a complaint chose to exercise its "discretion" to—for all practical purposes—recall the case from the court in order to "cooper up" its decision under review. To paraphrase the *Strickland* court's language, courts should not be procedural pawns whose authority can be frustrated, whether by administrative misadventure or, as here, deliberate agency action.

We respectfully submit that the appellants present no substantial questions for the decision of this Court, and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

WILLIAM B. ADAMS
PETER T. BEARDSLEY
NELSON J. COONEY

Attorneys for Appellees

---

[48] In Acme Cartage, *supra*, 290 F. Supp. the court states at p. 457:

> If particular rules prove overrigid or otherwise unsatisfactory in practice they can be amended as experience dictates.

[49] J.S. in No. 369, p. 8a.

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellees herein, and a member of the Bar of the Supreme Court of the United states, hereby certify that on the 10th day of September, 1969, I served copies of the foregoing Motion on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Erwin N. Griswold, Solicitor General, and John H. D. Wigger, Esq., Department of Justice, Washington, D. C. 20530; and the Honorable Eugene G. Cushing, United States Attorney, and the Honorable Charles W. Billinghurst, Assistant United States Attorney, 324 Post Office Building, Tacoma, Washington 98402.

2. On the Interstate Commerce Commission, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Arthur J. Cerra, Esq., its Associate General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Farm Lines, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to its counsel of record, Joseph A. Califano, Jr., Esq., and John D. Hawke, Jr., Esq., 1229 19th Street, N. W., Washington, D. C. 20036; and William L. Peterson, Jr., Esq., and James M. Robinson, Esq., 401 North Hudson, Suite 200, P. O. Box 917, Oklahoma City, Oklahoma 73101.

4. On other appellees, by mailing copies, in duly addressed envelopes, with postage prepaid, to their counsel of record, William H. Dempsey, Jr., Esq., 734 Fifteenth Street, N. W., Washington, D. C. 20005; Ed White, Esq., 517 West Adams St., Chicago, Illinois 60608; and Robert E. Joyner, Esq., 2111 Sterick Building, Memphis, Tennessee 38103.

APPENDIX A

NAMES OF APPELLEES HEREIN

Alamo Express, Inc.
American Trucking Associations, Inc.
Black Ball Freight Service
Braswell Motor Lines, Inc.
Brown Express, Inc.
Central Express, Inc.
Central Forwarding, Inc.
Central Freight Lines, Inc.
Consolidated Copperstate Lines
D-C International, Inc.
Garrett Freightlines, Inc.
H. S. Anderson Trucking Co.
IML Freight Inc.
J. H. Rose Truck Line, Inc.
J. J. Willis Trucking
J. V. Harrison Truck Lines, Inc.
Miller Truck Line, Inc.
Navajo Freightlines, Inc.
Pacific Intermountain Express Co.
Red Arrow Freight Lines
Robertson Tank Lines, Inc.
T.I.M.E. Freight, Inc.
Transcon Lines, Inc.
Western Gillette, Inc.

APPENDIX B

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20310

U 672
JAGU 1968/9695

15 May 1968

Temporary Authority Board
Interstate Commerce Commission
Washington, D. C. 20423

Re: American Farm Lines Application for 180 Days Temporary Authority Over Irregular Routes (General Commodities and Class A and Class B Explosives)

Gentlemen:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I wish to call the Commission's attention to the following facts in connection with the above-entitled application and the desirability of the immediate issuance of temporary authority to American Farm Lines for the transportation of general commodities and Class A and Class B explosives from areas in the Middle West to the west coast and in reverse direction.

The Department of Defense is constantly looking for ways to "shorten the pipeline" of its vital military supplies. This is effected through reduced transit times between points of manufacture and warehouses, and warehouses and points of export. A speedup in transit time will bring about a greatly improved logistics effectiveness resulting in reduced cost to the Government.

The Department of Defense has used the services of American Farm Lines to transport more than 1200 shipments (Government Bills of Lading) since December

1966. Its services to the Department of Defense have been excellent in every respect. The services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general. Its shorter service is necessary as both a measure and a participant in "shortening the pipeline." A sound adequate transportation system is essential to the national defense. Accordingly, the military establishment supports as many diverse carriers and routes as can be supported by the economy.

Services rendered to the Department of Defense by American Farm Lines have been provided pursuant to an "exemption" from economic regulation. However, recent court actions have resulted in interpretations of that exemption which will severely limit American Farm Lines' ability to continue to provide the service to the Department of Defense that it is currently receiving and which the Department of Defense considers desirable and necessary. Under the circumstances, if the Department of Defense is to continue to receive this extremely desirable service, an immediate grant of temporary authority is necessary. For example, since the United States District Court for the Western District of Oklahoma issued its decision on 20 February 1968, enjoining American Farm Lines from performing back to back transportation service for the Department of Defense, American Farm Lines has been required to turn down more than 700 truckloads of Department of Defense traffic. Prior to the injunction, American Farm Lines moved approximately 300 truckloads of Department of Defense freight per month. Accordingly, the Department of Defense urges the Interstate Commerce Commission to grant the temporary authority sought by American Farm Lines to assure the continued availability of its service. The Department of Defense will also support the desirability of the issuance of comparable permanent authority to American Farm Lines.

This office will be pleased to furnish any additional information that you may desire.

Sincerely yours,

/s/ Curtis L. Wagner, Jr.
CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division